MERIT SYSTEM REPORTER

A digest of notable Merit System decisions

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TO OUR READERS:

In order to better serve our customers in State and local jurisdictions, the Department of Personnel has created Customer Service Teams. Listed below are the names and telephone numbers of the managers and team leaders showing the counties and municipal jurisdictions in those counties and the New Jersey State Departments that they serve:

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Team Leader: Larry Catell - 609-292-3152
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TEAM #2

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Team Leader: Larry Shanks - 609-292-0554
Passaic County and the New Jersey State Departments of Community Affairs, Corrections and the New Jersey State Parole Board

Team Leader: Judith Gottlieb - 609-984-1042
Bergen County, Hudson County and the New Jersey State Department of Commerce and Economic Development

NEW JERSEY DEPARTMENT OF PERSONNEL

Christine Todd Whitman
Governor

Shaping a quality work force through competence, caring and commitment

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TEAM #4

Beth Van Marter, Manager - 609-292-9689
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Team Leader: Marsha Weinstein - 609-984-2344
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Team Leader: Mildred Hopper - 609-292-6950
NJ State Departments of Labor, Transportation and the Office of the Public Defender

TEAM #6

Carmen Ward, Manager - 609-292-9429
Team Leader: Janet Haney - 609-292-0575
Team Leader: David Cockerham - 609-633-9840
Cumberland , Gloucester, and Salem Counties and the NJ State Department of the Treasury and Office of Administrative Law, Casino Control Commission and NJ Public Broadcasting

Team Leader: Anthony Gricco - 609-984-7118
Atlantic and Cape May Counties and the NJ State Departments of Environmental Protection,
Personnel and the Governor's Office, Juvenile Justice Commission, Legislature, Palisades
Interstate Park Commission and Office of Student Assistance

Sick Leave Injury Benefits Denied for Failure to Establish Work-Relatedness of Carpal Tunnel Syndrome

In the Matter of Jeanette O'Leary, Greenbrook Regional Center
(Merit System Board, decided July 25, 1995)

Jeanette O'Leary, a Cottage Training Technician with Greenbrook Regional Center, Division of Developmental Disabilities, Department of Human Services, represented by Anthony L. Mezzacca, Esq., appeals the denial of continued sick leave injury (SLI) benefits.

Ms. O'Leary sustained cervical radicular syndrome resulting from a work-related accident on March 4, 1993, and was diagnosed as having cervical strain and radiculitis due to another accident on November 26, 1993 when she was assisting a client getting up from the floor. SLI benefits were granted for all of her related work absences during the period through January 3, 1994. Subsequently, the treating orthopedist referred her to a consultant physician for a nerve conduction velocity study (electromyography), which revealed that there were no electrical abnormalities suggestive of cervical radiculopathy but that moderately severe carpal tunnel syndrome in the right hand was found. As a result, surgery was performed on January 27, 1994 and Ms. O'Leary stayed off duty until February 10, 1994. The appointing authority terminated continued SLI benefits from January 27, 1994 to February 8, 1994 pursuant to *N.J.A.C.* 4A:6-1.6(c)4, which provides that progressive, degenerative or repetitive motion disorders, such as asbestosis or carpal tunnel syndrome, are compensable only when the claim is supported by medical documentation clearly establishing that the disorder would not have occurred but for the performance of specific work duties.

On appeal, Ms. O'Leary presents medical reports and bills, nearly all of which address

her cervical/lumbar conditions. With regard to carpal tunnel syndrome, Ms. O'Leary's orthopedist states that while it is difficult to categorically assign a work-related cause, he is inclined to attribute her symptoms to the November 26, 1993 incident.

In response, the appointing authority affirmed its position reasoning that Ms. O'Leary's work-related neck and shoulder injury was resolved as of January 3, 1994 and that her current carpal tunnel syndrome was not compensable since it is not work-related. It points out that, according to the consultant physician's January 10, 1994 report, Ms. O'Leary disclosed to the physician that she had a hobby of knitting and that she had been suffering from myxedema since 1965, for which she had been taking Synthroid until 1993. The appointing authority presents that myxedema is one of the conditions that can cause the contents or the structure of the carpal tunnel to swell and press the median nerve against the transverse carpal ligament. Based on the foregoing, the appointing authority maintains that the record does not conclusively establish that appellant's carpal tunnel syndrome was work-related.

Conclusion

A review of the record reveals that appellant's work-related cervical/lumbar injury had been resolved as of January 3, 1994 as reported by the consultant physician and that her current carpal tunnel syndrome is a separate claim, to which she has the burden of proof by a preponderance of the evidence to establish her entitlement.

Pursuant to uniform SLI regulations, a repetitive motion disorder such as carpal tunnel syndrome generally is not compensable unless it is medically established to be a result of the disabled employee's job duties. Here, although the orthopedist maintains that appellant's carpal tunnel syndrome could be work-related, a consulting physician noted that Ms. O'Leary had a hobby of knitting in the past and that she suffered from myxedema since 1965. Since the record indicates that myxedema is known to be a condition which can cause the swelling of the carpal tunnel, Ms. O'Leary has failed to establish the work-relatedness of her disorder by a preponderance of the evidence and, thus, is properly denied continued SLI benefits.

Order

Therefore, it is ordered that this appeal be denied.

Aggravation of Work-Related Injury Within One Year of Original Accident Occurrence Warrants Sick Leave Injury Benefits

In the Matter of Kevin R. James, Marlboro Psychiatric Hospital

(Merit System Board, decided April 18, 1995)

Kevin R. James, a Human Services Assistant with Marlboro Psychiatric Hospital, appeals the denial of sick leave injury (SLI) benefits. Mr. James alleged that he injured his back on September 20, 1994 while playing volleyball with a client. Appellant was treated by State-authorized physicians for a back strain and lower posterior neck strain but lost no time from work. On September 29, 1994 appellant reinjured his back while restraining a client. He was treated by State-authorized physicians for an upper back muscle strain and a thoracic sprain and received SLI benefits from September 29 to October 6, 1994. On October 13, 1994 appellant again claimed that he injured his back while restraining a client. He was treated by

State-authorized physicians for a parascapular muscle sprain and recurrent right scapular strain and authorized off duty until October 18, 1994.

The appointing authority denied appellant's request for SLI benefits on the basis that the October 13, 1994 accident aggravated a preexisting back condition which resulted due to his injuries of September 20 and September 29, 1994. See *N.J.A.C.* 4A:6-1.6(c)2.

On appeal to the Merit System Board, appellant alleges that he is entitled to SLI benefits since his injury is work-related.

Findings of Fact

Upon independent review and careful consideration of all material presented, the Board made the following findings:

1. Mr. James alleged that he injured his back on September 20, 1994 while playing volleyball with a client. Appellant was treated by State-authorized physicians for a back strain and lower posterior neck strain but lost no time from work.

2. On September 29, 1994 appellant reinjured his back while restraining a client. He was treated by State-authorized physicians for an upper back muscle strain and a thoracic sprain and received SLI benefits from September 29 to October 6, 1994.

3. On October 13, 1994 appellant claimed that he injured his back while restraining a client. He was treated by State-authorized physicians for a parascapular muscle sprain and recurrent right scapular strain and authorized off duty until October 18, 1994.

4. The appointing authority denied appellant's request for SLI benefits on the basis that the October 13, 1994 accident aggravated a preexisting back condition.

5. There is no medical documentation in the record which establishes that appellant's injury was not work-related.

6. Under these particular circumstances, appellant has established entitlement to SLI benefits.

Conclusion

The appointing authority denied appellant's request for SLI benefits on the basis that the October 13, 1994 accident aggravated a preexisting back condition. See *N.J.A.C.* 4A:6-1.6(c)2. It based its denial on the fact that appellant had previously sustained injuries to his back on September 20 and September 29, 1994. However, an employee who is disabled due to a work-related injury is entitled to SLI benefits for the one-year period following the initial date of injury. See *N.J.A.C.* 4A:6-l.6(b)3. While appellant aggravated a preexisting condition, the incident which caused the aggravation occurred within one year of the original accident and appellant is entitled to SLI benefits for an aggravation of a prior work-related injury within one year of the original work-related accident. Appellant was treated by State-authorized physicians and certified as disabled from work. Accordingly, under these particular circumstances, appellant has established entitlement to SLI benefits.

Order

Therefore, it is ordered that this appeal be granted.

Elimination of Review of LECR Examination Questions and Answers for Reasons of Security and Confidentiality Upheld

In the Matter of Canio S. Dadezzio, Police Officer (M4331S), South Plainfield and Park Police Officer (C0270S), Middlesex County

(Commissioner of Personnel, decided July 27, 1995)

On July 13, 1995 the Merit System Board received a copy of a Notice of Appeal filed by Canio S. Dadezzio, represented by Jacqueline Jassner, Esq., in the above-captioned matter. This decision will amplify, pursuant to *R.* 2:5-1(b), the decision of the Merit System Board rendered in this matter on May 9, 1995.

Appellant appealed the fact that he was not permitted to review the examination questions and answers for the Police Officer (M4331S), South Plainfield and Park Police Officer (C0270S), Middlesex County examinations. The Merit System Board found that the review availability was limited in this case given the critical nature of all law enforcement jobs and this examination's security. The Board noted that the Law Enforcement Candidate Record (LECR) examination taken by appellant was purchased from a nationally recognized psychometric consulting organization in Washington D.C. and the consulting organization scores and processes all of the candidates' test papers. Further, the Board found that according to uniform regulations, the Commissioner of Personnel may eliminate the review of examination questions and answers in order to maintain the security of the examination process. See *N.J.A.C.* 4A:4-6.4(e). Moreover, the Board noted that appellant's test papers were reviewed and his score was determined to be correct and appellant did not specifically challenge the validity of the test or any of his answers.

It is noted that Richardson, Bellows, Henry and Company, Inc. is the vendor and the copyright holder of the LECR examination. The New Jersey Department of Personnel typically gives the LECR examination twice a year, in the summer, around June, and in the fall, from mid-October to mid-December. This increases to at least three times in years in which the State Police gives the same examination. The Department of Personnel eliminates the review of examination questions and answers for security reasons. The autobiographical questionnaire score, which is the major component of the LECR, is made up of items which receive a score because their particular responses have been demonstrated to be selected in a statistically significant fashion by more successful (or less successful) officers. Since most of these items are one-of-a-kind, not replaceable in nature, exposing them to review would slowly erode their confidentiality and in turn the job-relatedness of the instrument and the value of the copyright. In addition, the elimination of the review of examination questions and answers protects the integrity-confidentiality of a copyrighted examination's scoring system by preventing any candidate from securing actual item answers and thereby gaining an unfair advantage over other candidates. It also prevents groups of candidates acting on behalf of test-training organizations from "stealing" item answers.

Moreover, these needs for security and confidentiality were recognized, not only by the State of New Jersey, but also by the United States Department of Justice. Section 11 of the Consent Decree entered in the U.S. District Court for the District of New Jersey for law enforcement titles provides that "In light of the need to maintain the security of the LECR for further development and subsequent use, candidate question and answer key review for all administrations of the LECR by the State shall be eliminated pursuant to *N.J.A.C.* 4A:4-6.4(e) and this Decree." It is also noted that the test is used in the following states with the same security-confidentiality protection: Arkansas, Colorado, New York, Illinois, Rhode Island,

Michigan, Nevada, Missouri, Virginia, North Carolina, Georgia, Oregon, Washington and Ohio.

Good Cause Not Presented for Relaxation of Layoff Seniority Rules

In the Matter of Hospital Attendants, Hudson County

(Merit System Board, decided June 13, 1995)

Lawrence Henderson, Director of Personnel for the County of Hudson, requests relaxation of the pertinent provisions of *N.J.A.C.* 4A:8-1.1, *et seq.*, to allow the County to retain less senior male Hospital Attendants, while laying off more senior female Hospital Attendants to allow for the rehire of male Hospital Attendants where "appropriate," to maintain a ratio of male to female Hospital Attendants that corresponds to the ratio of male to female Psychiatric Unit patients. In support of its request, the County maintains that in reviewing the Department of Personnel's seniority listing of Hospital Attendants for the upcoming layoff, it has determined that a significant number of male Hospital Attendants will be laid off due to their low seniority relative to more senior female Attendants. The County alleges that the layoff of male Attendants will generally impose a great hardship upon the patients at the Meadowview Psychiatric Facility and the County of Hudson. Specifically, it contends that the layoff of male Hospital Attendants will place the County in jeopardy of violating State regulations concerning the privacy and dignity of male residents of the Psychiatric Facility. Specifically, the County cites the provisions of *N.J.A.C.* 8:43G-4.1, which provide that patients must be treated with courtesy, consideration and respect for their dignity and individuality and that they should have physical privacy during medical treatment and personal hygiene functions, such as bathing and using the toilet. The County also maintains that it has previously been cited by the New Jersey Department of Health for not having a sufficient number of male Attendants. However, it provides no evidence in support of this assertion.

Arnold S. Cohen, Esq., responds on behalf of Susan M. Cleary, Acting Vice-President, District 1199J, that the County's request is an inappropriate attempt to circumvent employee seniority layoff rights under *N.J.A.C.* 4A:8-2.1. Specifically, Mr. Cohen asserts that the provisions of *N.J.A.C.* 8:43G-4.1 cited by the County in support of its request do not in any way mandate that female Hospital Attendants not work with male patients. Rather, he maintains that these provisions refer to the exposure of patients to other patients or the public. In addition, Mr. Cohen asserts that the County's reference to an alleged citation from the Department of Health is vague and unsubstantiated, failing to indicate when the inspection occurred, the manner in which compliance was sought, or the method by which the County attempted to hire new Attendants to meet this mandate. In conclusion, Mr. Cohen maintains that a relaxation of the layoff rules as suggested by the County to allow Meadowview Psychiatric Facility to maintain a ratio of male and female Hospital Attendants that would correspond to the ratio of male and female patients has no rational basis and would constitute sex discrimination.

Conclusion

N.J.A.C. 4A:1-1.2(c) provides that the Merit System Board may relax a merit system rule for good cause in a particular situation, on notice to affected parties, in order to effectuate the purpose of Title 11A, New Jersey Statutes.

In the present matter, utilization of the provisions of *N.J.A.C.* 4A:1-1.2(c) to allow for a relaxation of the layoff rules, and thereby maintain at Meadowview Psychiatric Facility in

Hudson County a ratio of male to female Hospital Attendants that corresponds to the ratio of male to female psychiatric patients, would be inappropriate. The provisions of *N.J.A.C.* 8:43G-4.1 cited by the County in support of its petition do not mandate the action requested; the County provides no evidence of the citation from the New Jersey Department of Health to which it refers in its submissions; and the Division of Equal Opportunity and Affirmative Action, within the Department of Personnel, indicates that it has received no request by the County for a bona fide occupational qualification (BFOQ) designation for the title of Hospital Attendant. Moreover, the County fails to provide any evidence which establishes that it is essential to successful job performance and the normal operation of the appointing authority that male psychiatric patients be cared for by male Hospital Attendants. Thus, the County has failed to present good cause to relax the pertinent provisions of *N.J.A.C.* 4A:8-1.1, *et seq*.

Order

Therefore, it is ordered that this request be denied.

HEARING MATTERS:

The performance of security duties is a vital and integral function in correctional facilities and human services' institutions such as psychiatric hospitals and developmental centers. As the cases below demonstrate, failure to comply with security regulations or properly perform security duties, such as census counts, may result in the elopement of a prisoner or patient or the threat of harm to other employees or the public. The following decisions concern the imposition of discipline for such violations and represent a sampling of the circumstances in which charges of this nature are appropriate.

Removal for Failure to Detect Escape of Juveniles Upheld

In the Matter of Brian Grant

(Merit System Board, decided July 9, 1996)

Appellant, a Juvenile Detention Officer with the Cumberland County Juvenile Detention Center, was removed on charges of neglect of duty and falsification of official documents. Specifically, the appointing authority asserted that, among other things, appellant failed to detect that two residents under his supervision had escaped. Additionally, he falsely completed

the room confinement checksheet for one of the juveniles by indicating that he had observed that juvenile asleep every 15 minutes from 11:00 p.m. to 6:45 a.m.

On the date of the incident at issue, appellant worked the 11:00 p.m. to 7:00 a.m. shift and his duties included watching the juveniles on two of four wings located on the second floor of the facility. In addition, on his shift appellant had laundry duty and was called downstairs to assist with an attempted suicide and to strip search the juvenile upon his return from the hospital.

One of the main duties of a detention officer at night is to keep a head count of the juveniles and to ascertain that they are alive and well and accounted for. The Chapter on Security and Control of the Institution's Policy and Procedures Manual provides that detention officers have the primary responsibility for the completion of an accurate head count and must be positive that they see a living human body before verifying a juvenile's presence. Moreover, the Manual states that bedchecks are required every 15 minutes during sleeping hours and if the juvenile is on room confinement, the 15 minute checks must be recorded on the room confinement checksheet. The appellant was trained in this policy and procedure and had signed a training checklist indicating same. One of the two juveniles who escaped was on room confinement.

At the hearing before the Office of Administrative Law, one of the juveniles, Mike, testified that at about 11:00 p.m. he and the other juvenile, Ed, began to punch and kick a hole in the ceiling which was about 9-1/2 feet high and constructed of plaster on wire mesh over wood. Mike and Ed stood on a ledge in the room not visible from the window in the door and kicked and punched at the ceiling for approximately two hours until a hole large enough to crawl through was made. Mike said that the appellant only came to the room twice, at the beginning of the shift and to let Ed go to the bathroom. Mike also testified that they made a lot of noise and other juveniles called out to them and, from the nature of their comments, the other juveniles knew what they were doing. Mike maintained that after they escaped, they walked into Bridgeton and passed the Courthouse and saw that it was 3:00 a.m. They also made some telephone calls, including one to Ed's girlfriend at 2:59 a.m., from a telephone down the hill from the Courthouse.

Patricia Wolak, the Superintendent of the facility, testified that appellant made entries on the room confinement checksheet indicating that he had observed Mike every 15 minutes from 11:00 p.m. through 6:45 a.m. and noted that Mike was "asleep," a total of 32 entries. Superintendent Wolak also testified that appellant knew that Mike was an escape risk because on a prior occasion he reported in writing that he overheard Mike tell someone he "would try running again."

Assistant Superintendent Glenn Saunders was the Training Officer when appellant was hired and he personally oriented, trained and tested appellant on institutional policies and procedures. He interviewed juvenile residents on one of the wings, all but one of whom said they heard the noise and that it kept them awake. He interviewed the appellant before he knew that the juveniles had left at 2:30 a.m. and appellant told him that the juveniles were in the room during his entire shift. Assistant Superintendent Saunders also found plaster and debris on the bed of the juveniles' room and some clothes but he found no dummy. Saunders, the Superintendent and another detention officer served a tour of duty on the 11:00 p.m. to 7:00 a.m. shift in order to see if the duties were too onerous for three persons, the number assigned on appellant's shift, and found that the tour was easily accomplished.

Appellant testified that when he performed the required bed checks and in the juveniles' room, he saw two people sleeping with blankets pulled over their heads and in the fetal position. Appellant stated that no one told him that they heard noises and the only noises that he heard were radios which some juveniles were allowed to play until 1:00 a.m. He advised

that, other than the juvenile who attempted to commit suicide, there were no problems that night.

Based on the above evidence, Administrative Law Judge Edgar R. Holmes (ALJ) found that it was unlikely that appellant looked into Ed and Mike's room a number of times on the night in question. He also found that appellant certainly did not see "a living human body" after 2:30 a.m. because of the testimony of Mike, which is corroborated by the record of telephone calls made by Ed on that night, since the juveniles were at the pay telephone down the street from the Cumberland County Courthouse at 3:00 a.m. The ALJ found that appellant utterly failed to keep an accurate head count or to properly monitor the juveniles in his custody and that this failure constituted neglect of duty. However, the ALJ did not find that appellant falsified the room confinement checksheet but was merely grossly negligent since his conduct was not purposeful and dishonest. Nevertheless, because the conduct resulted in the escape of the two juveniles and prevented the escape from being detected for many hours, the ALJ found the penalty of removal appropriate. Upon review, the Merit System Board affirmed the recommendation of the ALJ.

Conduct of Employee Which Creates Security Risk Warrants Suspension

In the Matter of Joseph Viteritto

(Merit System Board, decided June 11, 1996)

Appellant, an Assistant Engineer in Charge of Maintenance I at Northern State Prison, New Jersey Department of Corrections, was suspended for thirty (30) days. He was charged with inappropriate physical contact or mistreatment of an inmate, patient, client, resident or employee and conduct unbecoming a public employee. Specifically, the appointing authority asserted that appellant pushed another employee and improperly challenged the authority of the employee which created a security risk.

Northern State Prison is a maximum security facility housing inmates incarcerated for a variety of serious crimes, including murder, atrocious assault and battery and drug offenses. Appellant's duties include directing the performance of maintenance and repair work. The subject incident occurred in an outer lobby leading to a secured area where inmates were housed. A lobby officer was in charge of affording access to the secured area.

Testimony at the hearing at the Office of Administrative Law adduced that, on the day of the incident, appellant was to supervise the installation of a surveillance camera inside the secured area. He brought two inmates to do the installation and believed that he had approval to do so. However, the lobby officer, Officer Wormley, was authorized by her superiors to admit only one inmate to the secured area with appellant. Therefore, she did not permit appellant to pass with the two inmates.

Officer Wormley testified that appellant became visibly upset and raised his voice and that he also spoke in an elevated voice. Then appellant put his right hand on her left shoulder and pushed past her to reach for the telephone, which only the lobby officer was authorized to use. Although the force appellant used was not excessive, it was not accidental, either. As soon as this occurred, Officer Wormley reported the incident to her superiors.

A witness, Officer Frierson, testified that she was inside a glass and metal booth five or six feet away from Officer Wormley's podium at the time of the incident. Officer Frierson heard a loud and boisterous conversation coming from Officer Wormley's location and identified the voices as belonging to Officer Wormley and appellant. She heard appellant tell Officer Wormley to move out of the way so he could use the telephone. Although Officer Frierson could not see Officer Wormley due to an obstructed

line of vision, she did observe appellant walk toward Officer Wormley's podium with his hands raised.

Appellant admitted in his testimony that he was annoyed when Officer Wormley would not let him pass with the two inmates, but did not remember shouting at her. He also asserted that Officer Frierson could only have heard their conversation if there was extreme shouting. He stated that he is left-handed and reached with his left hand for the telephone. In doing so, Officer Wormley unexpectedly turned and the two brushed shoulders. However, he denied intentionally pushing her aside. When a superior arrived at the scene, the superior stated that he thought appellant needed only one inmate to install the surveillance camera.

Administrative Law Judge Ken R. Springer (ALJ) found that appellant had intentionally pushed aside Officer Wormley to get to the telephone, that appellant was annoyed with her and that the two had engaged in a shouting match. Moreover, since the altercation occurred in the presence of two inmates, appellant had undermined Officer Wormley's legitimate authority, noting that the maintenance of strict discipline is particularly important in military-like settings such as police departments, prisons and correctional facilities. The ALJ stated that, even if the lobby officer had been mistaken about whether appellant was authorized to utilize two inmates, he should not have challenged her authority or used any force but rather should have sought clarification from a superior. The ALJ concluded that appellant's conduct constituted conduct unbecoming a public employee. Since this was appellant's first disciplinary infraction, the ALJ recommended that the 30-day suspension be upheld. Upon review, the Merit System Board affirmed the recommendation of the ALJ.

Failure to Conduct Inmate Count Warrants Discipline

In the Matter of Robert Murie

(Merit System Board, decided August 6, 1996)

Appellant, a County Correction Officer with the Atlantic County Adult Detention Center, was suspended for ten days on charges of incompetency, inefficiency or failure to perform his duties, conduct unbecoming a public employee and neglect of duty. Specifically, the appointing authority asserted that on September 22, 1994, appellant failed to complete his watch tour and census count by notifying Center Control and, after the procedure was reviewed with the appellant by his supervisor, again failed to report his watch tour complete to Center Control. It further alleged that, on October 2, 1994, appellant reported that his watch tour was completed when in fact no tour had been completed.

The appointing authority's policy and procedure concerning watch tours and census counts provides, in pertinent part, that tours and counts will be done on the hour by the housing unit officer and on the half hour by the general assignment officer. However, in minimum security buildings (MSB), the policy and procedure provides that all counts will be done by the housing officer or his or her relief. In each case, the policy and procedure requires a call to be made to Center Control from the housing officer's telephone indicating that inmates are in their respective cells and are being counted alive and not in an unsafe situation.

Appellant was on duty as housing officer on September 22, 1994 and was required to call Center Control every half hour to report the inmate census. When appellant had not called Center Control by 2:13 a.m. to report his census count, the Center Control officer immediately reported the incident to Sergeant Bryan Viriglio, the supervising officer, in accordance with policy and procedure. Sergeant Viriglio testified that after receiving this report, he con-

tacted the appellant and instructed him that the security count calls were to be made every 30 minutes. Correction Officer Steele testified that at 4:15 a.m. appellant again failed to call in the inmate security count.

Sergeant Viriglio also testified that appellant was required to call in his inmate count every 30 minutes, with a five minute allowable margin to make his call. This timely call was required and important to ensure the security of the correction officers and the inmates. Sergeant Viriglio advised that although appellant had initially been assigned to the main building for September 22, 1994, odors from the floor stripper used in the Officers' Dining Room (ODR) had made appellant feel ill. As a consequence, appellant had been reassigned to the MSB. Sergeant Viriglio claimed that subsequent to appellant's failure to make the required call of inmate count at 4:00 a.m., he talked with the appellant who asked to see the nurse. Sergeant Viriglio did not receive any notice from the nurse that appellant could not return to duty and he was not aware of any reports of correction officers or inmates reporting ill due to the odor of the floor stripper. Correction Officer Steele also testified that appellant's station was approximately 125 feet from Center Control. Although he observed cleaners in the area, there were no reported problems about odors nor were there any complaints about odors from other officers or inmates.

Appellant testified that he complained about the fumes coming from the ODR where workers were stripping the floors and was moved from his assigned position at the main building to the MSB at approximately 1:20 a.m. where he was assigned to a dormitory and sat at a desk. Appellant asserted that he was still ill from the effects of the odor and assumed another officer would make the call to Center Control. He advised Sergeant Viriglio that he was accustomed to the main building procedure and assumed another officer had made the call. Appellant admitted that Sergeant Viriglio informed him that he was required to make the inmate count call to Center Control every half hour. Appellant asserted that he was not aware of different reporting procedures in the two buildings of the Detention Center and stated that he made the inmate count calls every half hour after being advised by Sergeant Viriglio of the requirement to do so. He admitted that he did not make the required call at 4:00 a.m. claiming that he passed out at about 4:05 a.m. However, there is no record that he advised the nurse or Sergeant Viriglio that he passed out at 4:05 a.m.

As to the October 2, 1994 incident, Correction Officer Keith Johnson testified that appellant gave him two different statements about the 4:30 a.m. tour. When Johnson contacted appellant to inquire about the 4:30 a.m. count and whether the tour had been conducted since the assigned correction officer was unavailable, appellant advised Johnson that the tour had been taken and the count called in. Correction Officer Jetter, the Center Control officer, confirmed that at approximately 4:30 a.m. he received a census count from the appellant. However, appellant later advised that he did not call in the inmate count because of a problem with an inmate and admitted that he missed the tour and stated that he was too busy to call and advise of his inability to complete the tour and count. Johnson required appellant to provide a written report of the incident; however, appellant's written report was very vague, did not explain why he fabricated the count and only dealt with appellant's failure to make the 4:30 a.m. tour, not the reasons for his failure to take the inmate count.

Appellant testified on his own behalf, asserting that he was involved with two problem inmates when the tour and count should have been made at 4:30 a.m. and did not realize that the count had not been completed until 4:45 a.m. He claimed that he reported to Johnson at 5:10 a.m. that he had missed the 4:30 a.m. tour and count because he had problems with inmates. Appellant also contended that he never called in a count to Jetter and alleged that Jetter filled in the count log before the count had been made. Further, appellant denied that he told

Johnson or Jetter that he had made the 4:30 a.m. tour and count and maintained that the statements of Johnson and Jetter to the contrary were untrue.

Upon review of the evidence, the ALJ found that appellant's testimony, providing excuses for his failure to complete his tour and count on three occasions and denying that he submitted a fabricated count on October 2, 1994, was inconsistent with either testimony rendered in this matter and with common experience. Therefore, he concluded that appellant's testimony was inherently incredible and that the appointing authority met its burden of proving by a preponderance of the credible evidence that appellant committed the infractions charged. Accordingly, the ALJ sustained the charges and the penalty of a ten-day suspension. Upon review, the Merit System Board affirmed the recommendation of the ALJ.

Neglect of Duty Dismissed but Suspension Imposed for Violation of Safety and Security Regulations

In the Matter of Kip Todd

(Merit System Board, decided March 26, 1996)

Appellant, a Senior Correction Officer at East Jersey State Prison, New Jersey Department of Corrections, was suspended for thirty days on charges of neglect of duty, loafing, idleness or willful failure to devote attention to tasks which could result in danger and violation of administrative procedures and/or regulations involving safety and security. Specifically, the appointing authority asserted the appellant failed to properly perform his duties during the course of an attempted escape by an inmate.

The record reveals that appellant was assigned to duty as the yard tower officer in the Administrative Segregation Unit (ACSU) at the time of the incident. The Administrative Law Judge (ALJ) found that the primary duty of the yard tower officer is to detect and prevent escapes from the ACSU and that, when the ACSU recreational yard is in progress, the yard tower officer is required to be outside the tower on the catwalk. When the incident at issue commenced, appellant was in the tower responding to a call from center control regarding a system alarm which had been activated. Following this call, he returned to his post on the catwalk and observed the inmate attempting to scale the yard fence. Appellant tried to communicate this information to the officers stationed in the yard and at Housing Control via radio, but his radio was dead. Appellant's radio was in working order when he went on duty and he had requested a fresh battery for the radio prior to beginning his shift but the request was denied. The ALJ further found that there was a problem within the institution with the batteries used to power the radios which were old and could not hold a charge.

In addition, the ALJ found that appellant did not have his rifle on his person at the time of the incident and that the sling which the appointing authority issued to appellant to carry the weapon was not the correct sling required by regulations.

The ALJ determined that there was no evidence of idleness, loafing or willful failure to devote attention to tasks which could result in danger to persons or property and the Merit System Board (MSB) agreed with this conclusion. The ALJ upheld the charge of violation of administrative procedures and/or regulations involving safety and security and also that of neglect of duty because, at the time of the incident at issue, appellant was not on the catwalk as required, did not have his rifle on his person and did not have a working radio. However, the ALJ concluded that the seriousness of appellant's infractions was mitigated by various factors, *i.e.* his failure to be on the catwalk was mitigated by the reason for that failure, his

presence in the tower to respond to a call from center control; his failure to have a working radio was mitigated by the refusal of his request for a fresh battery prior to the start of his shift and by the problems being experienced within the institution with the batteries used to power the radios; and his failure to have his rifle on his person was mitigated by the appointing authority's issuance of a sling for the weapon which was not the correct sling as required by regulations. Therefore, the ALJ recommended that the penalty be modified to a fifteen (15) day suspension.

The MSB agreed that the penalty should be modified to a fifteen-day suspension, as recommended by the ALJ, but did not agree with the ALJ's reasoning in support of that modification. Rather, the MSB concluded that appellant's failure to be on the catwalk did not constitute neglect of duty when the reason for his presence in the tower was to respond to a call from center control. The MSB noted that, had appellant remained on the catwalk as required, then he would not have responded to the call from center control and would have been subject to a neglect of duty charge for that failure. It observed that it was not possible for appellant to perform both of these duties, remaining on the catwalk and responding to a call in the tower, simultaneously and it was unfair to require him to choose which of these duties had the greater priority, a choice he would have had to make prior to answering the call from center control and thus, without knowledge of the exigency of the call. The MSB suggested that the appointing authority should provide guidelines to correction officers advising of the correct procedure to follow in such circumstances.

The MSB further concluded that appellant's failure to have a working radio did not constitute neglect of duty. The radio was functioning prior to the start of appellant's shift, and his request for a fresh battery due to problems occurring with the radio batteries was denied. Under such circumstances, the inoperable state of the radio was not within appellant's control and he had acted responsibly to insure that the radio was in working condition by requesting a fresh battery prior to commencing his shift. Thus, the MSB determined that appellant could not be held accountable for the non-functioning condition of the radio and that there was no basis for a finding that he neglected his duty in this regard.

However, the MSB found that appellant's failure to carry his rifle was a serious violation. It stated that appellant's disregard of the procedures and regulations requiring the yard tower officer to have his rifle on his person when on the catwalk was unacceptable and was not mitigated by the appointing authority's issuance of an incorrect sling for the weapon. In a paramilitary facility, such as a corrections institution, it is critical that procedures and regulations involving safety and security be strictly complied with. Thus, appellant had a duty to carry the rifle as required, despite the issuance of an incorrect sling for the weapon, and should have pursued action to obtain the correct sling at a later time. Based on the totality of the record, including the seriousness of the incident and appellant's prior record, the MSB concluded that it was appropriate to modify the penalty in this matter to a fifteen (15) day suspension.

The MSB further ordered that appellant be granted back pay, benefits and seniority for the period of fifteen (15) days.

Discipline for Neglect of Duty Reversed
In the Matter of Jeffrey S. Hilbert
(Merit System Board, decided April 30, 1996)

Jeffrey S. Hilbert, Senior Correction Officer, Mountainview Youth Correctional Facility (MYCF), New Jersey Department of Corrections, was suspended for six (6) months. Appellant was charged with incompetency, inefficiency or failure to perform his duties and neglect of duty. Specifically, the appointing authority asserted that appellant processed a package for an inmate containing a leather coat and a revolver with four rounds of ammunition that was found in the coat's left pocket.

High Point, a satellite complex of MYCF, is a minimum security facility with no fences located in a State park. Accordingly, inmates have access to the facility's perimeter, parking lot and nearby highway. For this reason, contraband sometimes entered the facility without undergoing examination procedures in the package room.

Appellant had been assigned for six months as a package room officer. On the date of the incident, appellant retrieved packages from the post office for some inmates at High Point, which he took to the package room for processing. In processing the packages, he checked inmate files to ensure inmates were eligible to receive the items and inspected each eligible item for any signs of contraband. One of the items received that day was a leather coat intended for inmate M.C. Appellant followed the proper procedure of stamping the coat with the inmate's number and putting it in a bag with other items intended for M.C. After searching and processing all of the inmate packages, he went to lunch and then took bags of items for delivery. He had two inmates unload the bags while he filed the inmate file folders and then went home for the day. Senior Correction Officer Leonard distributed the bags, including the leather coat, for which inmate M.C. signed. Later, Senior Correction Officer Clink performed a routine search of inmate quarters in Unit B. Unit B is an unsecured unit and the inmate dormitory has three entrances that are not locked at any time. Officer Clink found the leather coat hanging on a hook six feet from M.C.'s bunk, searched the coat and felt something while he was patting the pockets, which turned out to be a small gun. He brought this to his superior.

Sergeant Beers testified at the hearing at the Office of Administrative Law that he instructed package room officers on how to process and search items received through the mail. The instructions included placing the items one at a time on a table and checking the perimeter and hems for re-sewing. If pockets could not be turned inside out, the package room officer was to insert a hand into the pockets as far as it would go. All pieces of clothing with the exception of socks were to be stamped with the inmate's number, and placed in plastic bags. Sergeant Beers stated that appellant was the best package room officer with whom he had ever worked and that appellant would have found the pistol if it had been in the coat when he was processing it. The Sergeant testified that, at the departmental hearing, he demonstrated the stamping of an inmate's number on the leather coat, with a pistol in the coat's pocket. In doing so, he stated, the pistol fell out of the pocket.

Internal affairs investigator Chuck Muller testified that he conducted a month-long investigation concerning the weapon. He ascertained that M.C.'s girlfriend had mailed him the leather coat, which had belonged to one of M.C.'s brothers, C.C., and also traced the weapon to one of M.C.'s other brothers. However, C.C. had not intended for M.C. to receive a gun in the mail, and M.C. had not asked for one. In addition, M.C.'s mother had searched the coat before it was sent, in case it contained any inappropriate items. Also, M.C.'s girlfriend placed the coat in a box, along with other items,

before bringing it to the post office. She indicated that she had to take all of the items out of the box to rearrange them at the post office, and she did not find a weapon. Further investigation revealed that Sergeant Szollar was present in the package room when appellant processed and searched the leather coat.

Sergeant Szollar testified that he saw appellant open the package intended for inmate M.C. and take out the leather coat. Sergeant Szollar saw appellant pat down the front and back of the coat and roll it. Although he did not watch the entire search, he believed that appellant had put his hands in the coat pockets. The Sergeant further saw appellant turn the coat upside down to stamp it and that nothing fell out.

Appellant testified that, in searching the coat, he first laid it on a table and patted it down, rolled the coat to ensure that it did not contain hypodermic needles, and then stuck his hands in the pockets. He checked all sewn seams for new thread, and then the outside pockets for contraband and to see if the pocket linings had holes. He then checked the sewing on the inside of the belt loops, and all of the inside seams, pockets and collar. In addition, he turned the sleeves inside out and checked those seams. He then gave the coat a jerk to see if there was anything inside it, flattened it on the table again, patted it down and rolled it. All that he found as a result of the search was a belt in the coat's right hand pocket. Following the search, he stamped the coat's inside lining with the stamping machine, which required him to give the coat another hard jerk. Appellant demonstrated how he searched and stamped the coat. When he turned the coat upside down in preparation for stamping it, the gun, placed in a pocket for demonstration purposes, fell out. Finally, appellant stated that he was positive that the weapon was not in the coat when he processed it and indicated that when he returned to work following his six-month suspension, he did not undergo retraining and still works in the package room.

The Administrative Law Judge (ALJ) found that appellant was a credible witness with an excellent reputation as a package room officer, and that there was no direct evidence that the weapon was in the coat when it was examined in the package room. He also noted that the inmate's family members did not testify at the hearing in this matter, provided conflicting information during the investigation concerning the weapon, and had an interest in having it appear that the weapon arrived at the facility by accident. Additionally, he observed that there were many ways in which contraband could and did enter the High Point facility, and that the appointing authority must prove the disciplinary charges against the appellant by a preponderance of the credible evidence. The ALJ determined that the appointing authority did not sustain its burden of proof in this matter. Accordingly, he dismissed the charges against appellant and recommended that no penalty be imposed. Upon review, the Merit System Board affirmed the recommendation of the ALJ and awarded appellant back pay for the period of the suspension and reasonable counsel fees in accordance with *N.J.A.C.* 4A:2-2.12.

OF PERSONNEL INTEREST

CONSOLIDATION OF APPEAL ACTIVITIES

By: A. Peter Boone, Manager, Administrative Appeals

In order to provide for more effective delivery of dispute resolution services to our customers and more efficient use of Departmental resources, appeal activities have been collapsed and consolidated. As a result, the Department's appeal function has been reorganized so that all appeals are being handled by the Division of Merit System Practices and Labor Relations and final decisions are being rendered after one level of review.

The consolidated appeal system replaced a multi-level process which required that the Department utilize its resources to perform the same process several times. Under the new system, Departmental appeal resources have been consolidated and all dispute resolution activities have become the primary mission of a single unit within the Department. Thus, appeals on issues such as examination scoring and validity are no longer subject to preliminary review and decision by operations division staff. If overall policy considerations are at issue, the one-step appeal system provides for a more efficient means of addressing such issues. Moreover, the consolidated system provides for expeditious review and finalization of examination scoring and validity challenges. Under the old system, eligible lists could be certified and appointments effected while test scoring challenges which could affect list rankings were in process. This circumstance was problematic not only for an appellant whose scoring appeal was pending but also to the appointee whose appointment might be in jeopardy. Under the consolidated system, overall appeal processing time should be reduced, thereby maximizing the ability to provide a meaningful remedy to a successful appellant and minimizing any adverse effect to an otherwise innocent party.

Under the consolidated system, the Commissioner of Personnel decides administrative proceedings in which a Department of Personnel operating division is a party. The Merit System Board decides appeals which involve the appointing authority and the employee as adversarial parties. However, the Commissioner has retained the right to refer administrative proceedings to the Board for review and decision based on the facts of a particular case. Since the current statute provides for Board review of administrative appeals such as examination eligibility, scoring and validity, changes in the statute are needed to implement a one-step appeal process and avoid an overload of disputes before the Board. Nevertheless, in order to allow all of our customers an opportunity to evaluate the appeal consolidation effort, this initiative has been implemented for a one year period as a pilot program pursuant to *N.J.S.A.* 11A:2-11(i). This pilot program was implemented in October and if successful, legislation will be proposed to codify the consolidated appeal system.

FROM THE COURT

Following are recent Supreme Court and Appellate Division decisions in Merit System cases. As the Appellate Division opinions have not been approved for publication, their use is limited in accordance with *R.*1:36-3 of the N.J. Court Rules.

Removal From List for Psychological Unfitness Affirmed

In the Matter of Glen A. Chowanec
A-6232-93T2 (App. Div., July 20, 1995)

Glen A. Chowanec appeals from a final administrative determination by the New Jersey Merit System Board which ordered his name removed from the eligible list for appointment as a Jersey City Police Officer.

Chowanec, who is employed as a Hudson County Police Officer, had applied to become a Jersey City Police Officer. Psychological examinations incident to the application process raised questions respecting whether Chowanec was psychologically suited to perform effectively as a Jersey City Police Officer. Based upon those concerns, the appointment authority declared him ineligible and Chowanec appealed to the Merit System Board. The matter was presented to the Medical Review Panel which reviewed reports of two psychologists retained by Chowanec which concluded that he was not psychologically precluded from performing duties as a police officer. The Medical Review Panel determined to recommend testing by a psychologist wholly independent of either Chowanec or the appointing authority. The Merit System Board concurred with this recommendation and referred Chowanec for independent testing by Timothy M. Bogen, Ph.D.

The results of Dr. Bogen's testing and interview with Chowanec were set forth in a report and recommendation, copies of which were forwarded to the appointing authority and Chowanec. Dr. Bogen considered his own testing and interview results, as well as letters of recommendation indicating that Chowanec had performed well as a Hudson Police Officer, and the several previous psychological reports. He concluded that,

> Despite all his psychological strengths, Mr. Chowanec shows serious problems with inconsistency in his perception and reporting. His reports cannot be trusted to be accurate or truthful. A police officer must show greater consistency and trustworthiness.
>
> The observer is presented, then, with this puzzling set of observations. On the one hand, from the letters of recommendation presented, Mr. Chowanec has been an excellent Police Officer in his career so far. Yet, in psychological evaluations, he appears seriously inconsistent and untrustworthy. The behavior shown in this evaluation is so troubling that, despite his work history, he cannot be considered psychologically fit for the position.

Accordingly, Dr. Bogen recommended that removal of Chowanec's name from the eligibility list should be upheld.

Exceptions were filed by Chowanec's attorney, who also made request for Rorschach test results, Dr. Bogen's notes and the tape of Dr. Bogen's testing. The Rorschach results and Dr. Bogen's notes were forwarded, and opportunity was given for counsel to listen to the audio cassette tape, absent facilities for reproduction. Counsel expressed dissatisfaction with the intelligibility and extent of the recorded tape which appeared limited to Rorschach testing. Counsel also contended that Dr. Bogen's handwritten notes of his interview were unintelligible, thus interfering with the ability of Chowanec's psychological expert to review the ink-blot test results.

The Merit System Board determined to

proceed on the record before it, including the several recommendations submitted by Chowanec's superiors and coworkers in the Hudson County Police Department. Noting that Chowanec's assignment with the Hudson County Police was with the Division of Weights and Measures, the Merit System Board determined to accept and adopt the recommendation and report of the independent evaluating psychologist and concluded that, "The appointing authority has met its burden of proof that Glen Chowanec is mentally unfit to perform effectively the duties of a Police Officer and therefore orders that his name be removed from the eligibility list for police officer, Jersey City."

On appeal Chowanec urges that the Merit System Board should have complied with his request to furnish his counsel with a legible copy of Dr. Bogen's notes and that such failure constituted a denial of due process. The argument is clearly without merit. *R.* 2:11-3(e)(1)(E).

Our careful review of the entire record considered by the Merit System Board satisfies us that the decision is supported by substantial evidence in that record and that it was not arbitrary, capricious or unreasonable. Ordinarily, this ends our inquiry. *Henry v. Rahway State Prison*, 81 *N.J.* 571, 579-80 (1980). As to the allegation that due process was denied because the Merit System Board, while furnishing a clear copy of Dr. Bogen's notes, did not undertake to transcribe his handwriting, we note that a mere subjective "expectancy" is not an interest in property protected by procedural due process. *See In re Crowley*, 193 *N.J. Super.* 197, 210 (App. Div. 1984). Additionally, Dr. Bogen's report fully satisfies even a due process challenge. Chowanec's attorney was free to seek to rebut that report with opinions of other experts, and indeed, counsel exercised his right to file exceptions on other grounds. Further, counsel was not precluded from requesting opportunity to communicate with Dr. Bogen to the extent that he deemed it necessary to secure interpretation of the notes, or explanation of the taped Rorschach test.

The proceedings were fairly conducted. The record supports the determination of the Merit Board. Accordingly, it is affirmed.

Standard for Review Not Satisfied in Grievance Concerning Overtime Pay

Michael Viggiano v. Adult Diagnostic & Treatment Center and Commissioner of Personnel

A-6917-93T5 (App. Div., Nov. 8, 1995)

Michael Viggiano, a Sergeant at the Adult Diagnostic and Treatment Center (ADTC), appeals from the Commissioner of Personnel's determination that the denial of his grievance is not entitled to review by the Merit System Board. We affirm.

Viggiano was authorized by his supervisor, Assistant Superintendent Scott Faunce, to attend training at the Middlesex Fire Academy in order to become a Fire Marshal at ADTC. He was provided paid leave time to attend those classes which were conducted during working hours. Viggiano contends that Faunce agreed to pay overtime for attending the course on his regular days off.

After Viggiano successfully completed the course, ADTC refused to provide compensatory time for training during the regular days off. Viggiano filed a grievance. The Departmental Hearing Officer found that "there was no evi-

dence that ADTC committed to grant compensatory time for classes held on grievant's (regular days off)." Viggiano appealed that decision to the Merit System Board. However, the Commissioner of Personnel denied review because Viggiano did not meet the Merit System Board's standard for the exercise of its discretionary authority.

Under *N.J.A.C.* 4A:2-3.7(b)(2), the Merit Board will not review departmental determinations of grievances unless, the grievance appeal presents issues of general applicability in the interpretation of law, rule, or policy. The Commissioner concluded that Viggiano's case did not meet that standard[1]. We must defer to the agency's interpretation of its own regulation, promulgated to implement the statutes which the agency is charged with administering. *Medical Society v. Dept. of Law and Public Safety*, 120 *N.J.* 18, 25-26 (1990). We have no warrant to interfere with the Commissioner's determination. Moreover, the Departmental Hearing decision does not appear to be arbitrary, capricious, or unreasonable.

Affirmed.

[1] Despite that determination, the Commissioner observed that Viggiano was unlikely to prevail on the merits since there was no showing that Faunce "was authorized to enter into such an agreement."

Employees Working in a Non-Limited Title Not Entitled to Cash Overtime Compensation

In the Matter of Jeffrey Callahan, Sheree J. Davis, Eileen Fitzpatrick, John Michael Hanlon, David M. Haslam, Edward Mulcahy, Ronald Raymond, Janis D. Stia and Allan Webber

A-286-94T2 (App. Div., Sep. 5, 1995)

Nine Department of Transportation ("DOT") employees appeal a decision of the Commissioner of the New Jersey Department of Personnel denying their request for monetary compensation for hours that each worked beyond thirty-five hours per week during 1991 and 1992.

Each of the employees participating in this appeal was employed by DOT in a civil service position with an unlimited work week designation, "NL." Employees with an NL designation are paid a higher base salary than those civil service employees with a thirty-five hour per week designation, but they are paid a lower base salary than those civil service employees with a forty hour per week designation. Because NL employees routinely work in excess of thirty-five but less than forty hours per week, they are theoretically assumed to work thirty-seven and one-half hours per week. The salary differential and hourly work week differential are regulated by *N.J.A.C.* 4A:3-4.2 and *N.J.A.C.* 4A:6-2.3.[1]

It is undisputed that each employee claimant, during the period of time in controversy, was routinely scheduled to work a forty hour week. DOT contends, and claimants do not challenge, that this was a result of scheduling errors. Ultimately, claimants registered a complaint. After an investigation, the Commis-

[1] *N.J.A.C.* 4A:6-2.3(b)1 provides: "Non-limited (NL) titles are those titles in which employees work at least a 35 hour workweek with occasional requirements for a longer workweek to complete projects or assignments." *Ibid.*

sioner of Personnel directed that claimants' future employment should routinely require thirty-five hours per week, with an understanding that each might be called upon to work in excess of thirty-five hours per week, but not in excess of forty hours per week. Each claimant was offered compensatory time of one-half hour for each hour worked in excess of thirty-seven and one-half hours per week for that period of time in which the employee had been erroneously scheduled to work forty hours per week. All claimants rejected that offer and demanded monetary compensation for the hours worked in excess of thirty-five hours per week. Claimants' demand was rejected by the Administrator of the Department of Personnel Office of Personnel Management.

Claimants appealed the rejection of their demand for monetary compensation to the Commissioner of the Department of Personnel, who issued an administrative decision on August 2, 1994. After reviewing the various hour requirements of civil service employees encompassed within *N.J.A.C.* 4A:3-4.2, the Commissioner concluded that monetary compensation was prohibited by *N.J.A.C.* 4A:3-5.3, but claimants could be compensated by compensatory time, as had been offered by the Department of Personnel. That decision resulted in this appeal.

We conclude that the Commissioner correctly determined that under the relevant regulations, claimants were not entitled to monetary compensation in the form of back pay for periods in which each claimant worked in excess of thirty-five hours per week. Therefore, we are compelled to affirm the Commissioner's decision.

As a matter of regulation, civil service employees designated as NL employees are not entitled to either monetary compensation in the form of back pay or, as a matter of right, to compensatory time for those hours worked in excess of thirty-five hours per week.[2] *N.J.A.C.* 4A:3-5.3; *N.J.A.C.* 4A:3-5.6(a)(2).

The Commissioner's decision rejecting claimants' demand was predicated upon the clear meaning of the cited regulations. As the express language of the regulations does not permit an award of monetary compensation to claimants, the agency correctly denied claimants' demand, and the Commissioner's decision affirming that decision cannot be rejected by this court. *Allen v. Board of Trustees, Police and Firemen's Retirement Sys.*, 233 *N.J. Super.* 197, 207 (App. Div. 1989).

Although claimants on appeal argue that DOT acted in bad faith, which would permit an award of monetary compensation for those hours worked by each claimant in excess of thirty-five hours per week, the record on appeal is devoid of any fact upon which a finding of bad faith could have been reached. In fact, as noted by the State, claimants have referred to the DOT's action in scheduling their respective work hours as an "error" and as a "mistake." Although that error encompassed a substantial period of time, it is clear that once the "error" in scheduling was brought to claimants' superiors, efforts were undertaken to rectify that error. Although there are circumstances in which back pay may be granted, *N.J.A.C.* 4A:2-1.5(b), the circumstances of claimants' claims do not fall within the purview of that regulation. The claim here is specifically resolved by the regulatory relief embodied in *N.J.A.C.* 4A:3-5.6(a)2, and the Commissioner correctly looked to that regulation in affirming the decision of the Department of Personnel.

Our standard of review compels that a decision of an administrative body is affirmed unless a review of the record demonstrates that the decision was arbitrary, capricious or unreasonable. *Henry v. Rahway State Prison*, 8 *N.J.* 571, 579-80 (1980). Further, the decision of the Commissioner is supported by substantial credible evidence in the record as a whole. *Ibid.*

We accordingly affirm the decision of the Commissioner.

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[2] *N.J.A.C.* 4A:3-5.3(d)1 provides that compensatory time off is granted with the discretion of the appointing authority and with the approval of the Commissioner, for time worked in excess of the regular workweek, but not more than forty hours.

This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Supreme Court. Please note that, in the interests of brevity, portions of any opinion may not have been summarized.

Limitation on Sick Leave Injury Benefits to One Year Period From First Date of Disability Upheld

In the Matter of Irene Musick, Department of Corrections

143 *N.J.* 206 (1996)

Sick-leave injury (SLI) benefits for State employees who sustain work-related injuries are benefits that are supplementary to otherwise collectible workers' compensation benefits. The issue on appeal is the validity of an agency interpretation of a regulation that would limit SLI benefits to a one-year period following the first date of disability from work.

Irene Musick contracted carpal tunnel syndrome in connection with her employment as a clerk-bookkeeper in the New Jersey Department of Corrections (DOC). Carpal tunnel syndrome (CTS) is a disease of the musculoskeletal system most often associated with the stress arising from the repetitive movement of the hands, in this case, across a computer keyboard. The symptoms of CTS are pain, numbness in the hands, and sometimes pain radiating to the back. The effects of this disease are painful and can be disabling.

On August 14, 1989, Musick was referred by her employer to a DOC physician because of pain and numbness in the fingers of her left hand and pain in her left arm and shoulder. The DOC physician examined her and then referred her to West New Jersey Occupational Health Services (WJO). Doctors at WJO diagnosed CTS of the left hand and told Musick to stay out of work. However, the DOC personnel office ordered her to return to work on August 28, 1989, in disregard of the doctor's order. Because of extreme pain, Musick was referred by her doctor to an orthopedic surgeon who operated on Musick's left hand on September 21, 1989. She was cleared to return to work on November 27, 1989.

Musick's employer denied her claim for SLI benefits for the period between August 14 and November 27, 1989. The employer contended that Musick had failed to establish that her condition was work-related. Musick appealed this denial of benefits to the Merit System Board (the Board). Musick relied on the opinion of her doctor that the left-hand CTS was work-related. Initially, the Board denied Musick any SLI benefits for her left-hand CTS. Musick appealed to the Appellate Division. That court remanded the matter to await the outcome of other matters pending in the Appellate Division.

Shortly after the remand, Musick suffering from pain in her right hand, which was diagnosed as work-related CTS. Musick underwent surgery on the right hand on September 3, 1991. On September 16, 1991, Musick was again diagnosed with CTS of her left hand and had a second surgery on October 15, 1991.

On January 6, 1992, the Board issued its final decision in respect of Musick's CTS-related SLI claims. The Board found that she was disabled from work from August 14, 1989, until November 27, 1989, due to left-hand CTS, and was disabled from August 6, 1991, until October 9, 1991, as a result of right-hand CTS. The Board further found that Musick was disabled from October 9, 1991, until December 2, 1991, as a result of recurrence of CTS in her left hand. The Board granted Musick SLI benefits for the

period of August 14 through November 27, 1989, for left-hand CTS and from August 6 through October 9, 1991, for right-hand CTS. The Board denied SLI benefits for left-hand CTS from October 9 through December 2, 1991, finding that this was just a continuation of Musick's disability from the 1989 claim. Relying on *N.J.A.C.* 4A:6-1.6(b)3, the Board concluded that SLI benefits are limited and are not compensable for disabilities that continue for more than a one-year period.

On appeal, the Appellate Division reversed and remanded the case for an award of SLI benefits reflecting the 1991 recurrence in Musick's left hand. The Appellate Division found that the disability was related to her work and that there was no reasonable basis to penalize Musick for the hiatus in her disability of that hand. The Appellate Division reasoned that there was nothing in the enabling statute, *N.J.S.A.* 11A:6-8, to indicate that the Legislature had any contrary intent. Therefore, the court invalidated *N.J.A.C.* 4A:6-1.6(b)3 to the extent that it would cap the benefits at one year from the date of injury.

The Supreme Court granted the Board's petition for certification.

HELD: Given the Merit System Board's balanced approach to recognition of repetitive stress injuries and its overall need to allocate available resources among all State employees, the Board's policy determination to limit SLI benefits to one year from the first date of the disability is within the agency's statutory mandate, and application of that policy to Irene Musick does not constitute such a clear abuse of discretion as to warrant judicial intervention.

1. Prior to October 1991, claims for SLI benefits for CTS were routinely denied. By late 1991, the Board recognized that the policy needed to be changed and, accordingly, began to award SLI benefits for CTS claims. By October 1992, the Board eliminated the need to establish a one-time occurring accident or traumatic event in order to get SLI benefits. In January 1993, the Appellate Division dealt with the application of the one-year limitation on benefits in *In re Naomi Dykas*, where it was held that it was on the date the disability began and not the date when the injury or illness became manifest that the one-year time limitation begins to accrue. The *Dykas* court in dicta dealt with the hiatus issue by finding that the employee should not be penalized by the hiatus in disability. (pp. 5-10)

2. The Board's policy is clear that provable claims of CTS will be recognized but SLI benefits will be limited to one year from the first date of disability from work. In response to *Dykas*, the Board amended *N.J.A.C.* 4A:6-1.6(b)3. In that amendment, the Board rejected the hiatus exception. (pp. 10-11)

3. Courts have only a limited role in reviewing the actions of other branches of government. Courts can intervene in the administrative actions of governmental agencies only in those rare circumstances in which an agency action is clearly inconsistent with its statutory mission or other state policy. In setting aside an agency decision, the Court must determine whether: 1) the agency followed the law; 2) the record contains substantial evidence to support the findings on which the agency bases its action; and 3) in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of relevant factors. In this case, the Court addresses the first and third prongs of that test. (pp. 12-14)

4. The Legislature has given a very broad mandate to the Board to adopt the necessary rules and regulations to implement the SLI benefits program. It is not an irrational choice of policies to establish a fringe benefit for State employees that differentiates between an employee whose injury and treatment require an immediate and protracted absence from work, and an employee whose treatment and absences from work may fall beyond one year from the date of the initial injury. Such a classification is not suspect. Although the issues are debatable, the debate regarding the choice of competing policies should be reserved for the agency

itself unless the Legislature's intent is clear. (pp.14-17)

Judgement of the Appellate Division is **REVERSED** and the decision of the Merit System Board is **REINSTATED**.

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